

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

JOYCE M. WEAVER,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION H-05-1677
	§	
JO ANNE B. BARNHART,	§	
Commissioner, Social	§	
Security Administration,	§	
	§	
Defendant.	§	

MEMORANDUM AND RECOMMENDATION

Plaintiff Joyce M. Weaver filed this case under the Social Security Act, 42 U.S.C. § 405(g), for review of the final decision of the Commissioner denying her request for disability insurance benefits.¹ The parties have filed motions for summary judgment (Dkts. 13, 14). Having considered the parties' submissions, the administrative record, and applicable law, the court recommends that Weaver's motion be denied and the Commissioner's motion be granted.

I. Background

Weaver filed for disability benefits under Title XVI of the Social Security Act on January 15, 2003 alleging she was unable to work due to a back disorder. After her application and request for reconsideration were denied, Weaver requested a hearing before an administrative law judge (ALJ). The ALJ conducted a hearing on November 10, 2004 at

¹ The district court referred the case to this Magistrate Judge for pre-trial management.

which Weaver, her husband, and a vocational expert testified. The ALJ determined that Weaver was not disabled because she was able to perform jobs that exist in significant numbers in the national economy. The Appeals Council denied Weaver's request for review on March 17, 2005, making the ALJ's determination the final decision of the Commissioner of Social Security. Weaver now seeks judicial review of the Commissioner's final decision pursuant to 42 U.S.C. § 405(g).

II. Analysis

A. Standard of Review

Section 405(g) of the Social Security Act sets forth the standard of review in this case. The federal courts review the decision of the Commissioner to deny Social Security benefits to determine whether (1) the Commissioner applied the proper legal standard and (2) the Commissioner's decision is supported by substantial evidence. *Waters v. Barnhart*, 276 F.3d 716, 718 (5th Cir. 2002); *Masterson v. Barnhart*, 309 F.3d 267, 272 (5th Cir. 2002). Substantial evidence is "more than a scintilla and less than a preponderance." *Masterson*, 309 F.3d at 272; *Newton v. Apfel*, 209 F.3d 448, 452 (5th Cir. 2000). The court does not reweigh the evidence, try the questions *de novo*, or substitute its own judgment for that of the Commissioner. *Masterson*, 309 F.3d at 272.

In order to qualify for disability benefits, a plaintiff must prove she has a disability, which is defined under the Social Security Act as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment

which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. §§ 423 (d)(1)(A) and 1382c(a)(3)(A); *Masterson*, 309 F.3d at 271. The administrative law judge must follow a five-step sequential analysis to determine whether a plaintiff is in fact disabled:

1. Is the claimant currently engaged in substantial gainful activity, *i.e.*, working? If the answer is yes, the inquiry ends and the claimant is not disabled.
2. Does the claimant have a severe impairment? If the answer is yes, the inquiry proceeds to question 3.
3. Does the severe impairment equal one of the listings in the regulation known as Appendix 1? If so, the claimant is disabled. If not, then the inquiry proceeds to question 4.
4. Can claimant still perform his past relevant work? If so, the claimant is not disabled. If not, then the agency must assess the claimant’s residual functional capacity.
5. Considering the claimant’s residual functional capacity, age, education, and work experience, is there other work claimant can do? If so, claimant is not disabled.

20 C.F.R. §§ 404.1520, 416.920; *Waters*, 276 F.3d at 718. At step five, the burden shifts to the Commissioner to show that employment for the claimant exists in the national economy.

Wren v. Sullivan, 925 F.2d 123, 125 (5th Cir. 1991).

B. The Commissioner’s Decision and the Evidence of Record

Weaver is a 45 year old female (44 at the time of the hearing) with a ninth grade education. From 1998 until 2001 she worked as a leasing agent/manager for the mobile home community where she lives with her husband. Prior to that she worked as a laundry

worker. A vocational expert testified that a leasing agent is a light exertion, skilled position, and a laundry worker is a medium exertion, unskilled position.

Weaver suffers from degenerative disc disease. Her impairment is severe, but it does not meet or medically equal in severity any impairment listed in Appendix 1, Subpart P, Regulation No. 4, and thus there is no presumption of disability. The ALJ determined that Weaver was not able to perform her past job as a leasing agent. These first four steps of the sequential analysis are not in dispute.

There is no statement in the record from a treating physician regarding Weaver's residual capacity to work. This in itself does not make the record deficient. *Ripley v. Chater*, 67 F.3d 552, 557 (5th Cir. 1997). The issue is whether the decision of the ALJ is supported by substantial evidence in the existing record. *Id.* In *Ripley*, the only evidence in the record regarding the claimant's ability to work was his own testimony. *Id.* at 557-58. Therefore, the district court remanded the case to the ALJ with instructions to obtain a statement from claimant's treating physician regarding his ability to work. *Id.* Here, in addition to Weaver's testimony, the record contains the opinion of a State Agency reviewing physician.

The State Agency reviewing physician found that the nature of the impairment and the symptoms reported in the medical records do not support Weaver's claimed limitations. The reviewing physician determined that Weaver could lift 50 pounds occasionally and 25 pounds frequently, stand and/or walk 6 hours out of an 8 hour workday, and sit 6 hours out

of an 8 hour workday. These limitations equate to a residual capacity to perform work requiring a medium exertion level.

In addition to the reviewing physician's opinion, the record also contains testimony and statements from Weaver. In a Daily Activity Questionnaire, Weaver stated that she walks for exercise as much as she can, and that on an average day she walks and sits around the house. She noted that she cannot sit, stand, and walk for long periods of time. In testimony, she stated that some days she has to lay down twice for about five minutes due to pain, and on other days she has to get up and move around constantly to avoid back pain. She also testified that she grocery shops with the assistance of her husband, cooks once a day, loads the dishwasher, and uses a small vacuum cleaner. She walks most days.

As the ALJ noted, the record shows that Weaver has a sporadic work history with several years of no earnings, raising some question as to the reason Weaver is not currently working. In addition, the medical records do not reveal objective factors that support her subjective allegations of disabling pain. Weaver gained weight during the period covered by her medical records, a fact generally inconsistent with disabling pain. *See Hollis v. Bowen*, 837 F.2d 1378, 1384 (5th Cir. 1988) (objective factors that support allegations of disabling pain include limitations of range of motion, muscle spasm, muscle atrophy, neurological deficits, weight loss or impairment of general nutrition, and non-alleviation of pain by medication).


The evidence in the record is sufficient to support the ALJ's findings that while Weaver is not capable of performing a full range of light work, including her past employment as a leasing agent/manager, she could perform light work that allows her to alternate sitting and standing. The vocational expert testified that there are jobs in the national economy for a person with Weaver's education and experience, such as office helper, ticket seller, or cashier.

III. Conclusion

Substantial evidence in the record supports the ALJ's decision that Weaver was able to do light work that allows for alternate sitting and standing. Therefore, the court recommends that plaintiff's motion for summary judgment be denied, and defendant's motion for summary judgment be granted.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. PRO. 72.

Signed at Houston, Texas, on December 29, 2005.



Stephen Wm Smith
United States Magistrate Judge